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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 3012

EARL P. COOK,

Plaintiff,

vs.

BEN W. FORTSON, JR., AS THE DULY APPOINTED, QUALIFIED, AND ACTING SECRETARY OF STATE OF THE STATE OF GEORGIA; J. LON DUCKWORTH, CHAIRMAN OF THE DEMOCRATIC EXECUTIVE COMMITTEE OF THE STATE OF GEORGIA; GRACE CANNINGTON, SECRETARY OF THE DEMOCRATIC EXECUTIVE COMMITTEE OF THE STATE OF GEORGIA; AND THE DEMOCRATIC EXECUTIVE COMMITTEE OF THE STATE OF GEORGIA, AN UNINCORPORATED ASSOCIATION,

Defendants

To the Supreme Court of the United States:

Pursuant to the provisions of Rule No. 12 of the Supreme Court of the United States, the above-named plaintiff and appellant files this his separate statement particularly disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to

review the order and judgment denying interlocutory injunction, appealed from herein, as follows:

(a) Basis upon Which It Is Contended That Supreme Court Has Jurisdiction and Statutory Provisions Believed to Sustain Jurisdiction.

The Supreme Court of the United States has jurisdiction of this cause upon appeal by virtue of the fact that it is a direct appeal under Sec. 266 of the Judicial Code as amended (U. S. C. A. Title 28, Sec. 380), and allowed under Sec. 238 of the Judicial Code as amended (U. S. C. A. Title 28, Sec. 345). The complaint was brought under the provisions of U. S. C. A., Title 28, Sec. 41, subsection 14, and the prayers are for a Declaratory Judgment and for further relief by way of a writ of injunction, pursuant to Judicial Code Sec. 274d (U. S. C. A. Title 28, Sec. 400).

(b) The Statutes of the State, and the Rules of the Democratic Party Having the Force of Law by Virtue of Such Statutes, the Validity of Which Is Involved.

The laws of the State of Georgia, the validity of which are attacked directly as unconstitutional as aforesaid, are to be found in the Code of Georgia of 1933 (Annotated), which is the official edition of said Code, Book 12, Part VI, Chapter 34-32 (pages 91 through 99), and more especially Sections 34-3212 through 34-3218 (pages 95 through 99), the latter Sections, as originally enacted, being found in Georgia Laws, 1917, pages 183 through 189.

The "county unit rule," which is here attacked as unconstitutional may be appropriately summarized (from Sec. 34-3212, at page 96, Book 12 of said Code) as follows:

> "Candidates for nomination . . . who receive, respectively, the highest number of popular votes in any given county shall be considered to have carried such county, and shall be entitled to the full vote of

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such county on the county unit basis, that is to say, two votes for each representative to which such county is entitled in the lower House of the General Assembly . . ."

Sec. 34-3217 of said Code (page 99, Book 12), which permits, and as Appellant contends, invites the application of the "county unit rule" to Congressional primary elections is set out verbatim:

"Limitations.—Nothing in this law shall be construed to provide or require any definite unit of election for candidates for nominations for members of Congress, judges of the superior courts, solicitors general, members of the General Assembly and county officers; and this law shall not be construed to require a primary for any of the last-named officials, except in their respective districts, circuits or counties, as provided by law: Provided, however, that primaries for nomination of members of Congress, judges of the superior courts, solicitors general and members of the General Assembly shall be held on the date named in section 34-3212 for primaries for United States Senator, Governor, Statehouse officers, Justices of the Supreme Court and Judges of the Court of Appeals. (Acts 1917, p. 189)."

Section 34-3209 of said Code is as follows:

"Party Authorities May Formulate Additional Rules.—The party authorities shall, in all matters not provided for in this Chapter, formulate rules and regulations for holding said primary election and for making returns thereof to the proper party authorities. (Acts 1908, pp. 55, 57)."

Section 34-3210 of said Code is as follows:

"Time and Place of Election; Returns; Declaration of Result.—Every such primary election shall be held at the time and place, and under the regulations prescribed by the rules of the party, organization, or association holding the same, and the return shall

be made and the result declared as prescribed in this Chapter. (Acts 1890-1, p. 210; 1900, p. 40; 1908, p. 55)."

The rules of the respective Democratic Executive Committees which are alleged to have the force of law and to be unconstitutional are:

"*Rule VIII.* (of the State Committee)

Insofar as the Primary relates to the nomination of candidates for Congress from various Congressional Districts, such candidates shall be voted for only in the counties comprising their respective districts; and the Congressional Democratic Committee of each District shall determine whether the county unit or popular vote plan shall prevail."

"*Rule IV.* (of the Fifth Congressional District Committee)

A candidate receiving a plurality of the votes cast in a county shall be entitled to the unit vote for said county and the candidate receiving a majority of the county unit votes cast in said primary in said District shall name delegates from each County in the District to a convention of delegates to be held in the City of Atlanta, Georgia, on Saturday, July 27, 1946, at 11 o'clock A. M. in the Senate Chamber of the State Capitol. The delegates so appointed shall go to the convention and declare as the nominee the candidate who receives a majority of the County Unit votes cast in said primary.

"The number of delegates from each county shall be twice the number of representatives which said county has in the House of Representatives of Georgia.

"When said delegates have assembled in convention, they shall organize by the election of such officers as such convention may deem necessary and shall then proceed to declare as the nominee for Congress from the Fifth Congressional District the candidate receiving the majority of the County Unit votes cast in the primary."

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In order that the Court may comprehend fully the basis for the contention of Appellant that the rules of the Democratic Executive Committee of the State of Georgia, and of the Democratic Executive Committee of the Fifth Congressional District of the State of Georgia are, and should be declared to be, a part of the election machinery of the State of Georgia, and have the force of law, and to be unconstitutional, the attention of the Court is directed, in addition to those portions of the Code of Georgia already pointed out, to Sections 34-3215a and 34-3223 through 34-3236, appearing in 1945 Cumulative Pocket Part Supplement to Book 12 of said Code, pages 37 through 42 of said Supplement. Inasmuch as said Sections are not directly attacked as unconstitutional, they are not summarized or quoted herein.

(c) Date of Judgment

The judgment appealed from was entered on the 24th day of August, 1946, and filed on the 26th day of August, 1946.

The application for an appeal was presented on the 13th day of September, 1946.

(d) Nature of the Case and Rulings of the Court Bringing the Case Within the Jurisdictional Provisions Relied upon.

The appeal herein is from a judgment of the United States District Court for the Northern District of Georgia, Atlanta Division, denying the relief prayed for, the said Court before which this cause came on for a hearing being a court composed of three judges as by statute (28 U. S. C. A. Section 380) provided, said action being for a Declaratory Judgment and for further relief by way of a writ of injunction, to declare the aforesaid rules of the Democratic Executive Committee of the State of Georgia, and of the

Democratic Executive Committee of the Fifth Congressional District (above set forth) to be a part of the election machinery of the State of Georgia, and to declare unconstitutional the pertinent laws of the State of Georgia and the aforementioned rules of said Democratic Executive Committees, as applied to Congressional elections, as depriving plaintiff (appellant here) of the right secured to him and to each of the members of the class which he represents, by Article I, Sec. II, of the Constitution of the United States, and guaranteed by Amendment XIV thereto, to cast one entire vote, and to have said vote counted on an equal basis with every other vote cast by a qualified elector within the Fifth Congressional District, for a Member of Congress from said Congressional District.

(e) Grounds upon Which It Is Contended the Questions Involved Are Substantial

(1) By virtue of the said laws of the State of Georgia, providing for primary elections on the county unit basis, which are invalid upon their face when applied to Congressional elections, plaintiff, and each member of the class which he represents, is deprived of the right secured to him by Article I, Sec. II, of the Constitution of the United States, and guaranteed by Amendment XIV thereto, to cast one entire vote, and to have said vote counted on an equal basis with every other vote cast by a qualified elector within said Fifth Congressional District, for a Member of Congress from said Congressional District.

There are many members of said class. Of the qualified electors residing in Fulton County, Georgia (which has a population of 392,886 according to the 1940 Census), 41,981 cast their ballots, as did Appellant, for Mrs. Helen Douglas Mankin, the candidate for the Democratic nomination for Member of Congress from said Fifth Congressional District who received both the plurality and majority of all popular

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votes cast in said District in said primary election held July 17, 1946. Each of said ballots has been diluted and deprived of its force and was overridden by a substantially smaller number of votes cast elsewhere in said District. The constitutional right of each of these 41,981 electors is represented here by appellant.

This Court has frequently concerned itself with the disfranchisement of individuals contrary to the Constitution; how much more should it concern itself with this wholesale disfranchisement, of 41,981 individuals who voted, as well as of additional thousands who may have failed to vote because their votes were practically of no effect. An additional 100,000 votes cast for this same candidate in Fulton County would not have altered the result one whit.

While, as Appellant contends, the case is governed in principle favorably to Appellant's contentions by numerous decided cases of this honorable Court, the case is, upon its facts, a case of first impression, involving grave Constitutional questions.

(f) Cases Believed to Sustain Jurisdiction

Wiley v. *Sinkler*, 179 U. S. 58, 63;
Nixon v. *Condon*, 286 U. S. 73;
Colegrove v. *Green*, 90 L. Ed. 1212.

(g) Matters in Which the Specially Constituted District Court of the United States Abused Its Discretion

(1) It was the duty of the District Court to exercise a sound judicial discretion in granting or withholding relief;

(2) Stating that the case at bar is controlled in principle by the decision in *Colegrove* v. *Green*, 90 L. Ed. 1212, and that therefore equity should grant no relief, the Court refused to exercise its discretion.

(3) This refusal to exercise its sound discretion, appellant contends, amounted in law to an abuse of discretion.

(4) If it can be said that the District Court exercised its discretion in denying the interlocutory injunction prayed, upon the authority of *Colegrove* v. *Green, supra,* said Court abused its discretion, for, as appellant contends, the majority opinion in *Colegrove* v. *Green, supra,* shows upon its face that the rights there involved were the rights of a State, whereas, the rights herein sought to be protected are private rights of citizens of the United States.

(5) If it can be said that the District Court exercised its discretion in denying as aforesaid the interlocutory injunction prayed, said Court abused its discretion in so denying such relief, for the reason that the questions presented by plaintiff-appellant's application for interlocutory injunction were grave, and it appeared from plaintiff's complaint that the injury to plaintiff and to the class he represents would be certain and irreparable if the application were denied, and the final decree should be in his favor, whereas, if the injunction had been granted, the injury to the defendant, Ben W. Fortson, Jr., the Secretary of State of the State of Georgia, even if the final decree should be in favor of all the defendants, would have been inconsiderable, inasmuch as neither said Secretary of State nor any of the other defendants has any personal interest in the subject-matter of the complaint, and none of them would suffer any personal injury or damage.

(h) A Copy of the Opinion of the District Court Is Hereto Appended

Dated: This 13th day of September, 1946.

Respectfully submitted,

ALEX W. SMITH,
CROOM PARTRIDGE,
Solicitors for Plaintiff-Appellant.

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APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

Civil Action No. 3012

EARL P. COOK, *Plaintiff*,

vs.

BEN W. FORTSON, JR., as Secretary of State of Georgia; J. LON DUCKWORTH, Chairman, Democratic Committee of Georgia; GRACE CANNINGTON, Secretary, Democratic Executive Committee of Georgia; and DEMOCRATIC EXECUTIVE COMMITTEE OF GEORGIA

This cause on August 16, 1946, came on for a hearing for an interlocutory injunction before a court of three judges as by statute provided, composed of Hon. Frank M. Scarlett, District Judge duly designated to hold court in the Northern District of Georgia, and Hon. Samuel H. Sibley, Circuit Judge, and Hon. Louie W. Strum, District Judge for the Southern District of Florida, who were called to assist.

After hearing evidence and argument and taking time to consider, upon the Findings of Fact and Conclusions of Law filed herewith It Is Ordered and Adjudged

That the petition of Mrs. Helen Douglas Mankin to intervene and dismiss the cause be denied;

That an interlocutory injunction be denied.

This August 24, 1946.

SAM'L H. SIBLEY,
United States Circuit Judge;
LOUIE WM. STRUM,
United States District Judge;
F. M. SCARLETT,
United States District Judge.

Filed in Clerk's Office Aug. 26, 1946. F. L. Beers, Clerk, by C. A. McGrew, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

Civil Action No. 3012

EARL P. COOK, *Plaintiff*,

vs.

BEN W. FORTSON, JR., as Secretary of State of Georgia; J. LON DUCKWORTH, Chairman, Democratic Executive Committee of Georgia; GRACE CANNINGTON, Secretary, Democratic Executive Committee of Georgia, and Democratic Executive Committee of Georgia

The plaintiff, suing in behalf of himself and others similarly situated, avers that he is a Democrat qualified to vote in the general election to be held Nov. 5, 1946, and is pledged to vote for the Democratic nominees therein; a Democratic primary election was held July 17, 1946, to nominate a candidate for the House of Representatives of the United States for the Fifth District of Georgia embracing the Counties of Fulton, DeKalb, and Rockdale; in the election 104,554 votes were cast, 53,882 for one candidate, 43,163 for another, and 7,510 for a third; although the first candidate obtained a majority of all the votes, the second candidate was by the Fifth District Congressional Committee certified to the State Democratic Executive Committee as the nominee because that candidate had received a plurality of the votes in DeKalb County and in Rockdale County, while the other candidate had carried only Fulton County, which had a greater population and cast more votes than the other two counties combined; this certification was based on a rule of the State Executive Committee promulgated to govern the primaries as follows: "Rule VIII. In so far as the primary relates to the nomination of candidates for Congress from the various Congressional Districts, such candidates shall be voted for only in the Counties comprising their respective districts; and the Congressional Democratic Committee of each district shall determine whether the county unit or popular

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vote plan shall prevail"; and the Fifth Congressional Committee adopted a rule that "the candidate receiving the highest number of popular votes in any given County in said district shall be considered to have carried such County and be entitled to the full vote of such County on the county unit basis, that is to say, two votes for each representative to which such County is entitled in the lower House of the General Assembly." This rule is alleged to have the force and effect of law under the Georgia primary election statutes, Georgia Code of 1933, Sects. 34-3212 to 3217, as modified by Acts of 1944, extra session, pp. 2 & 4, and operates as a denial by the State of the equal protection of the law to the voters of Fulton County because their votes are severally given only a fraction of the effect given the votes in Rockdale County, which has two unit votes against six each for DeKalb and Fulton Counties, all in violation of the Fourteenth Amendment to the Constitution of the United States. The prayer is that the county unit rule, and the statute permitting its use, be declared unconstitutional and void, and the the rule promulgated by the Fifty District Congressional Committee be declared unconstitutional and void, and that the Executive Committee be enjoined from certifying to the Secretary of State any other nominee than the one who received the majority of the popular votes, and that the Secretary of State be enjoined from placing any other name as Democratic nominee on the general election ballot.

The Secretary of State moved to dismiss the complaint as to him because in effect against the State, and because the State is an indispensable party and cannot be enjoined without its consent. The other defendants also moved to dismiss because the matter is not of equitable cognizance but relates only to political matters, and that redress, if any is due, must be sought from the political and legislative departments of the State and United States; and because the House of Representatives is the constitutional judge of the election of its members. The answer further set up that voluntary participation in the primary estops the plaintiff from attacking its rules after it was over, and after the date at which candidates were required to qualify as such by Georgia law. It set up, too, that on a contest

the Contest Committee of the Democratic Executive Committee had decided that both the leading candidates should be certified to the Secretary of State as the Democratic nominees and this had in fact been done. The answer denied that the State law imposed the county unit rule on congressional primaries, which in this respect were purely party matters. It was alleged that there was confusion as to who rightly constituted the Fifth District Congressional Committee, and this was the reason for deciding that boh names should go on the ballot as Democratic nominees; and that an appeal is now awaiting action of the State Democratic Convention in October; and that because of the confusion it is better to leave the matter alone. The Secretary of State has already distributed to the Ordinaries of the counties of the Fifth District to be printed forms of ballots bearing the names of both nominees. The use of the county unit system to give a voice to all parts of the State in the Legislature, and in conventions of the political parties throughout the country, for a long time, is alleged.

Findings of Facts

On the hearing the sworn pleadings of each side were offered as affidavits, and they being in no serious conflict the facts above stated are found to be true.

Conclusions of Law

We make no final rulings on motions to dismiss, but consider them on the question whether an interlocutory injunction should issue. The petition to intervene filed by Mrs. Helen Douglas Mankin, referred to above as the majority candidate, in which she seeks to get the whole proceedings dismissed, we deny as not being in subordination to the main case.

We think the case is controlled in principle by the decision on June 10, 1946, in Colegrove *v.* Green, — U. S. —, and that equity should grant no relief, but leave any redress that may be due for the inequalities complained of to the action of the State legislature, or of Congress.* We greatly doubt

* Congress may have the final say under Constitution, Art. I, Sect. 4.

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that the county unit rule here complained of can be said to be imposed on a congressional primary by the State at all, so as to bring the Fourteenth Amendment into operation. Ga. Code of 1933, Sect. 34-3217, is express that "Nothing in this law shall be construed to provide or require any definite unit of election for candidates for nominations for Member of Congress." If the county unit be imposed in Congressional primaries it is by party action, not State action. But at last as matters now stand, the county unit rule is not being applied by anyone. The State Executive Committee has refused to apply it and has certified both candidates, and both are on the ballots which are being printed, and every Democrat is free to vote for his choice, and the popular vote will determine in the general election. The plaintiff and those he represents will get exactly what they claim they should have. The double certification is in effect a cancellation of the primary, as respects these two candidates. We cannot speculate on what the State Convention may do in October. At present we see nothing that ought to be enjoined, even if that remedy be available in such a case as this.

SAMUEL H. SIBLEY,
United States Circuit Judge;
LOUIE W. STRUM,
United States District Judge;
F. M. SCARLETT,
United States District Judge.

Filed in Clerk's Office August 26, 1946. F. L. Beers, Clerk, by C. A. McGrew, Deputy Clerk.